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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 496

AMALGAMATED TRANSIT UNION, AFL-CIO, *Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*

and

AMERICAN BUSLINES, INC. and NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Intervenor-Appellees*

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM AND BRIEF IN SUPPORT BY NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

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MOTION TO AFFIRM AND BRIEF IN SUPPORT

Appellee in the above-entitled case moves to affirm the judgment below on the grounds that the questions presented are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

The issue is whether any substantial questions are raised as to the following:

(a) Whether the labor conditions made mandatory under Section 5(2)(f) of the Interstate Commerce Act (Act), 49 U.S.C. § 5(2)(f), for rail carrier employees affected by transactions subject to Section 5 of the Act must be accorded to motor carrier employees affected by similar transactions under Section 5(2)(c) of the Act, 49 U.S.C. § 5(2)(c), giving the Commission discretionary authority to impose labor conditions for motor carrier employees:

(b) Whether the Commission abused its discretion in this proceeding; and

(c) Whether different treatment of rail and motor carrier employees is unlawfully discriminatory under the Fifth Amendment to the Constitution of the United States.

COUNTER STATEMENT OF FACTS

This is an appeal from a statutory three-judge District Court of the United States District Court for the District of Columbia, reported at 253 F. Supp. 481.[1] The appeal involves an award of labor protective conditions by the Interstate Commerce Commission under Section 5(2)(c) of the Act in an administrative proceeding for approval of transfers of operating rights between motor carriers of passengers.

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[1] The text of the decision is set forth in the appendix to Appellant's Jurisdictional Statement (hereafter Jur. St.) beginning at page 1a.

Three reviews of this case were completed by the Commission.[2] There have also been two reviews, initiated by appellants, by three-judge District Courts (221 F. Supp. 958 and 253 F. Supp. 481). Thus, this will be the sixth time the appellant has, with dogged determination, pursued its contention that the discretion accorded the Commission under Section 5(2)(c) of the Act may only be exercised by the imposition of the same labor protective conditions for motor carrier employees as the Commission is required to accord rail carrier employees under Section 5(2)(f) of the Act.

From 1953 through the first eight months of 1958, American Buslines sustained operating losses aggregating $2,222,797 (Jur. St., App. 29a). During this period of time the carrier was undergoing reorganization and it was operated by a trustee from February 10, 1954 through September 22, 1958 (*Ibid.*). Its monthly cash requirements were approximately $800,000 and its only source of funds was from borrowing or the sale of portions of its properties (*Id.* at 29a-30a).

In addition to its poor financial condition, American suffered by its employees represented by appellant (Amalgamated Transit Union) going on strike on July 1, 1958. The strike continued into 1959.

In the meantime, American was continuing with efforts to dispose of properties. These efforts culminated in an application filed with the Commission on November 18, 1958 for approval of a transfer of operating rights between Kansas City, Missouri and Mem-

[2] The decisions of the Commission are reported at 80 M.C.C. 681 (1959); 90 M.C.C. 173 (1962), and 97 M.C.C. 426 (1964).

phis, Tennessee to Midwest Buslines. On the following day a similar application was filed for transfer of operating rights between Memphis and Chattanooga, Tennessee to Continental Tennessee Lines.

On December 5 and 6, 1958, the Commission approved lease of these operating rights to the acquiring companies pending consideration of the applications for approval of the transfers under Section 5 of the Act. Hearings on the applications commenced on February 17, 1959. The appellant was an intervenor in the application proceedings.

A strike settlement was reached on July 18, 1959 and supplemented on July 31, 1959. The settlement contained a provision releasing all claims the parties had against one another. (See 90 M.C.C. 173; Jur. St., App. 10a).

The strike officially terminated on August 1, 1959. While the strike was in progress the American employees "scattered all over the country" (Jur. St., App. 32a). Accordingly, it was agreed between the parties after the strike that, while American was returning operations to normal, seniority in work assignments would not be observed and drivers could accept jobs in the system wherever they were open. Reemployment of all drivers was offered. Since there was a shortage of drivers in the Eastern District, based at Pittsburgh, jobs were open there and, in all, twenty-two of 41 drivers accepted employment in that District. These jobs paid more than ones in the Central or Southern Districts, where the reemployed drivers had formerly worked, but seniority was not carried from one district to another. Thus, in order to preserve seniority in the Central and Southern Districts, drivers

going to the Eastern District were given the opportunity to take furloughs from their former district of work and to return there with their seniority when jobs became available (Jur. St., App. 18a-19a).

On November 12, 1959, the Commission (Div. 4) approved the route sales and reserved jurisdiction for three years for the purpose of fashioning such employee conditions as could become necessary and lawful (80 M.C.C. 681). Thereafter, on December 31, 1960, the sales were consummated.

On April 11, 1960, appellant sought reconsideration for the imposition of conditions granting wage allowances and moving expenses to the employees. After hearings, Division 3 of the Commission determined, *inter alia,* that it could not be found that any losses of the employees were attributable to the route sales, rater than the strike, and the requested conditions were denied. (80 M.C.C. 173).

Appellant then sought judicial review and the first three-judge District Court reversed and remanded (221 F. Supp. 958). The Court stated that it "need not attempt to delineate what measure of relief, if any, should be provided to the employees of American . . ." The Court added that the Commission should give a "reasoned explanation" for not according employees the same conditions required for rail carrier employees under Section 5(2)(f) of the Act.

On remand the Commission again considered the argument that the mandatory labor conditions of Section 5(2)(f) for rail carriers must be adopted under the discretionary provisions of Section 5(2)(c) of the Act which is applicable to motor carrier employees. The National Association of Motor Bus Owners

(NAMBO), movant here, intervened in the proceeding before the Commission and argued that Section 5(2)(c) leaves to the discretion of the Commission the kind of conditions, if any, which must be prescribed for motor carrier employees. It added that the mandatory rail carrier provisions of Section 5(2)(f) are not applicable.

In its report the Commission reviewed the legislative history of Sections 5(2)(c) and 5(2)(f), concluding that Congress intended different treatment for bus and rail employees (Jur. St., App. 23a-27a). It found that alleged losses of wages from "bumping" and other causes are "impossible to ascertain, minor in extent, and difficult to attribute to this transaction rather than to the strike or other personnel adjustments." (Jur. St., App. 30a-fn. 6). It further found, however, that moving expenses, wage losses sustained by the employees while moving and related expenses could be attributed to the route sales and that the employees should be reimbursed to this extent (Jur. St., App. 31a). Accordingly it ordered lump sum payments to the employees approximating such costs.

Again the appellant sought judicial review and the second three-judge Court decision was issued (253 F. Supp. 481). The Court reviews the legislative history of the Act, concluding, as did the Commission, that the mandatory provisions of Section 5(2)(f) of the Act are not applicable under Section 5(2)(c) which gives the Commission discretion to fashion labor conditions for motor carrier employees. Reviewing the record before the Commission it found that discretion had not been abused.

The appellant thereafter filed this appeal.

ARGUMENT

NO SUBSTANTIAL ISSUES HAVE BEEN RAISED BY APPELLANT

A. The Mandatory Rail Carrier Provisions of Section 5(2)(f) of the Act Do Not Control Commission Discretion Under Section 5(2)(c) of the Act

Section 5(2)(c) of the Act requires the Commission to "give weight" to specified factors, including carrier employees affected, as follows:

> ". . . The Commission shall *give weight* to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis added.)

The language of the provision is directed to all carriers subject to the Act, including motor carriers regulated by the Commission. This is followed by the provisions of Section 5(2)(f), which are expressly directed exclusively to rail carriers and are couched in mandatory rather than the "give weight" discretionary terms of Section 5(2)(c), as follows:

> "*As a condiiton of its approval,* under this paragraph, of any transaction involving a *carrier or carriers by railroad* subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the *railroad employees* affected. In its order of approval the Commission *shall* include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in em-

ployees of the *carrier or carriers by railroad* affected by such order being in a worse position with respect to their employment . . . ." (Emphasis added).

Under the plain language of Section 5(2)(f) it applies only to rail carriers. Similarly, under the plain language of Section 5(2)(c) the Commission is accorded discretion as to conditions for employees (other than railroad) and their interests are only one of several other factors to be considered.

In its decision herein the Commission has given detailed reasons why Congress chose to differentiate motor carrier employees from rail carrier employees (Jur. St., App. 23a-27a). It refers to the fact that in 1936, before Section 5 was adopted in 1940, two hundred nineteen railroads entered into the so-called Washington agreement with twenty-one labor organizations which set out specific minimum protective conditions for employees affected by rail mergers (Jur. St., App. 14a, 25a). See *United States* v. *Lowden,* 308 U.S. 225, 234 (1939). These provisions were largely repeated in Section 5(2)(f) of the Act. In addition, "a large portion of rail operating employees possess long training and skills that can ordinarily be used only in the railroad industry and are not readily adaptable to other types of jobs, while exactly the reverse is true in the motor carrier industry, where drivers constituting 50 percent of the total employment, have skills which are readily transferable to the operation of any type of motor vehicle, and that, likewise, the mechanics, dispatchers, clerks, and other employees are also readily adaptable to similar jobs in other industries." (Jur. St., App. 13a, 28a). The Commission

further noted the greater financial ability of rail carriers to absorb labor condition costs (*Id.* at 28a). Finally, the Commission reviewed the legislative history of these provisions noting, among others, the letter of ICC Chairman Eastman to the Interstate Commerce Committees of the House and Senate, at the time the legislation was pending, in which he urged legislation for rail employees based on the so-called Washington Agreement and legislation for motor carrier employees "to make the authority discretionary rather than mandatory." (Jur. St. App. 25a).

Thus, the plain language of Congress in these provisions is based upon the realities of conditions in the rail carrier industry as they differ from conditions in the motor carrier industry. Aside from this, the intent of Congress is clear and the Commission correctly concluded that the mandatory provisions of Section 5(2)(f) of the Act do not control its discretion as to motor carrier employees under Section 5(2)(c) of the Act.

B. The Commission Did Not Abuse Its Discretion

The Commission, after considering the statute and its legislative history, outlined the nature of its discretionary exercise of authority in Section 5 proceedings involving motor carriers, as follows:

> ". . . Section 5 does require us to consider all aspects of the transaction as they affect the public interest. This includes the effect on employees. And in determining whether employees should receive any protection or compensation for the adverse effect which a transaction has upon them, we must consider the size and financial resources

> of the carriers involved, the expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry. . . ." (Jur. St., App. 28a).

These are matters in which the Commission is a recognized expert. It applied its expertise to considerations of the financial weakness of American over the years; the effect of the strike on the claims of the Appellant, *i.e.,* whether injuries alleged resulted from the strike or the route sales under review; the skills of employees involved; and the efforts made by American to find reemployment for the employees. On this basis it concluded that the employees were entitled to payments for some losses (moving expenses, loss of pay while moving, temporary maintenance of two households, and increased rents and utility costs) but not for others. This painstaking review of the evidence, conditions in the industry and applicable law is the very antithesis of abuse of discretion.

C. There Is No Violation of Fifth Amendment Guarantees

There is no merit whatsoever in the contention of appellant that different standards of treatment for rail and motor carrier employees would violate the Fifth Amendment to the U. S. Constitution. The contention is based on the erroneous assumption that the difference in treatment is discriminatory. The fact is that the difference is required by the differing conditions in the rail and motor carrier industries.

This Court has held that the "Fifth Amendment, unlike the Fourteenth, has no equal protection clause." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584-585 (1937); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310

U.S. 381, 401 (1940). Albeit, discrimination may be " 'so unjustifiable as to be violative of due process.' " *Schneider* v. *Rusk,* 377 U.S. 161, 168 (1963). However, as made clear in the opinion below, the plain language of the statute, the legislative history and the facts of the instant case, the variance of treatment of employees of motor carriers vis-a-vis railroad employees is completely in accord with the distinctions inherent in the two industries.[3] Accordingly, appellant's due process contention is unsubstantial.

CONCLUSION

The appellant, after five other opportunities in this case, is trying to bring about judicial amendment of Section 5(2)(c) of the Act. That section leaves to the discretion of the Commission what kind, if any, labor conditions are to be imposed in transactions subject to Section 5 of the Act. There is no requirement that the mandatory provisions of Section 5(2)(f) for rail carrier employees are to be applied to motor carrier employees. The discretion of an administrative agency is involved and it has been painstakingly applied without abuse.

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[3] Compare *Dominion Hotel* v. *Arizona,* 249 U.S. 265, 268 (1919), where the State of Arizona had exempted railroad restaurants from an hours-of-labor law applicable to hotels. Upholding the classification, this Court, per Holmes, J., said:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same names must be treated in the same way. . . . The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. . . ."

The questions thus raised by appellant are not substantial. The judgment below should be affirmed.

Respectfully submitted,

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